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IN THE
SUPREME COURT OF THE UNITED STATES.

No. 989 —
OCTOBER TERM, 1945

THE WM. SPENCER & SON CORPORATION (Plaintiff-
Appellant in the Court Below), *Petitioner,*

vs.

SAMUEL S. LOWE, Deputy Commissioner of the United
States Employees' Compensation Commission, Second
Compensation District, and LOUIS LINDENBERG
(Defendants-Appellees in the Court Below),

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF**

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PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, The Wm. Spencer & Son Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on December 26, 1945 (R. 72), affirming the judgment of the District Court of the United States for the Southern District of New York (R. 62-63), which affirmed the decision of the Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District, that the respondent, Louis Lindenberg, a lighter captain, was entitled to workmen's compensation under the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act (R. 10-13).

Your petitioner respectfully requests that this Court review the decision of the Circuit Court of Appeals for the Second Circuit because said decision is in conflict with the decision in a similar case by the United States Circuit Court of Appeals for the Third Circuit in *Tucker v. Branham, Deputy Commissioner*, 151 F. 2d 96.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit brought in the United States District Court for the Southern District of New York by petitioner, pursuant to the provisions of the United States Longshoremen's and Harbor Workers' Compensation Act (U. S. C. Title 33, Section 921), for a permanent injunction suspending and setting aside a compensation order and findings therein contained made by respondent, Samuel S. Lowe, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District, on September 26, 1944, with respect to the benefits ordered to be paid to respondent, Louis Lindenberg, and permanently and perpetually staying the enforcement thereof. The District Court entered judgment dismissing the complaint (R. 187), which judgment was affirmed by the Circuit Court of Appeals for the Second Circuit (R. 72).

Petitioner, as part of its business, engages to move freight in and about New York Harbor by means of vessels without motor power called lighters, gasoline hoisters and barges which are towed from place to place (R. 20-21). Respondent Lindenberg was a lighter captain by occupation (R. 20) and he was captain of petitioner's lighter "Boonton" (R. 21) which was afloat in the East River on June 6, 1944, the date he received his injuries (R. 44). Although some of the work done by Lindenberg was similar to that performed by longshoremen, checkers and tally men in connection with the loading and discharging of cargo

aboard vessels (R. 12), Lindenberg's duties also required him to direct the loading and discharging of freight to insure the vessel riding on even keel, pumping out water from the hold, making minor repairs, throwing lines to the dock when tying up and affixing them to the lighter when casting off from the dock; and tightening and loosening the lines from the lighter to the dock as occasion demanded (R. 12). The vessel had a cabin and eating and sleeping quarters which were used when the lighter captain worked overtime (R. 11). Lindenberg was employed as a lighter captain on a daily basis at a daily wage and paid for overtime. He had no seaman's papers and such papers were not required of him to perform his duties as a lighter captain. He was not furnished meals and lived off the boat except when actually on duty thereon while transferring freight in New York Harbor (R. 11). He received his injuries while he was painting the cabin of the vessel "Boonton" when he fell to the floor from a coal box upon which he was then standing (R. 12).

Respondent Lowe, as Deputy Commissioner, concluded that the services of Lindenberg were dissimilar to those of masters and members of the crews of vessels and that he was not a master or member of a crew of the lighter "Boonton" as the term "master or member of the crew of any vessel" is employed in Section 3(a)(1) of the Longshoremen's and Harbor Workers' Compensation Act (R. 12), although at the hearing he conceded that there was confusion in the Second Circuit as to the right of an employee in the same class with Lindenberg to seek compensation or to bring an action under the Jones Act for injuries received by him in the course of his employment (R. 51). He therefore made an award in favor of Lindenberg (R. 13), which was sustained in the District Court (R. 63) and the Circuit Court of Appeals, Second Circuit (R. 72).

QUESTION PRESENTED

Is a lighter captain excluded from coverage by the Longshoremen's and Harbor Workers' Compensation Act by Section 3 thereof as a "master or member of a crew of any vessel", as held by the Third Circuit, or is he included in said Act, as held by the Second Circuit.

REASONS FOR GRANTING THE WRIT

The discretionary power of this Court to grant the writ prayed for is respectfully invoked upon the following grounds:

1. The decision in the instant case by the Circuit Court of Appeals for the Second Circuit, rendered on December 26, 1945, is in conflict with the decision in an almost identical case by the Circuit Court of Appeals for the Third Circuit in *Tucker v. Branham, Deputy Commissioner*, 151 F. 2d 96, which was rendered on July 17, 1945, but which was not reported in time to be brought to the attention of the Circuit Court of Appeals for the Second Circuit in the instant case.

2. Petitioner, being engaged in moving freight in and about New York Harbor by means of lighters and barges, is confronted with the situation that if a lighter captain is injured on the New York side of the harbor, which is in the Second Circuit, the lighter captain would be covered by the Longshoremen's and Harbor Worker's Compensation Act, while if the lighter had crossed the Hudson River and was on the New Jersey side of the harbor, which is in the Third Circuit, the lighter captain would not be covered by that Act. Because of these conflicting decisions neither the employers nor the lighter captains can know which Federal law will govern a particular situation in the same

harbor, or which type of insurance, workmen's compensation insurance or liability insurance, must be carried for adequate protection, and such employers may be forced to carry both types of coverage until the law is fully settled.

PRAYER

Wherefore your petitioner prays that this Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Second Circuit, requiring that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full complete transcript of the record on its docket which is entitled *The Wm. Spencer & Son Corporation v. Samuel S. Lowe, Deputy Commissioner, and Louis Lindenberg*; that, upon such review and determination, the opinion and judgment of said Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE WM. SPENCER & SON CORPORATION,

By CHARLES LANDESMAN,
JOHN J. HICKEY,
WALTER W. AHRENS,
Counsel for Petitioner.